The European Journal of International Law Vol. 31 no. 4

'The War Rages On': Expanding Concepts of Decolonization in International Law

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Jochen von Bernstorff and Philipp Dann (eds). ***The Battle for International Law: South-North Perspectives on the Decolonization Era***. Oxford: Oxford University Press, 2019. Pp. 1495. £95. ISBN: 9780198849636

Abstract

The Battle for International Law *is a forceful collection that addresses the seismic challenges to the international legal order posed by the formal decolonization movements of the mid-20th century. The editors borrow from Reinhart Koselleck to frame the decades between the Bandung Conference in 1955 and the declaration of a New International Economic Order in 1974 as a* Sattelzeit*, or 'bridging period', between two eras of Western domination. The concept provides a coherent, flexible frame for a strong field of 19 chapters, organized around concepts, institutions, protagonists and regional perspectives emblematic of the period in question. At a time when exhibitionist defences of colonialism and imperialism are resurgent, this collection's solidarist restatement of key themes of Third World Approaches to International Law (TWAIL) and Marxist international law is timely. However, in reproducing international law's long-critiqued statist concept of decolonization, the editors effectively consign the politics of decolonization to the past, and to the South. This does not reflect contemporary debates on the meaning of decolonization as an on-going struggle with material and epistemic dimensions. As a result, the volume leaves a crucial question open for consideration: How might contemporary international lawyers conceive of their relationship to decolonization, understood not as an era of the 20th century, but as an unresolved challenge for the 21st?*

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1 Introduction

In the Epilogue to this forceful collection on the seismic challenges to the international legal order posed by the formal decolonization movements of the mid-20th century, Martti Koskenniemi offers a 'half-personal, half-professional' reflection, drawing on his experience as 'someone who spent many autumns in the 1980s sitting at meetings of the Sixth Committee of the UN General Assembly': 'we really had no clue that, while multilateral diplomacy was churning out resolution after resolution, these private law oriented rule of law projects were gradually globalizing the "developmental state" in most of the third world'.[1] From a European progressive perspective, the arc of international law may well have appeared to bend towards global justice between the mid-1950s and mid-1970s. The texts of the United Nations General Assembly declarations of the period, in their inky two-column layout, spoke a language of high rhetoric that still has the capacity to beguile idealist and cynic alike.

Yet, as the chapters in this collection unflinchingly recall, as the vocabulary of self-determination and sovereign equality became commonplace, the forces of capital were marshalling to beat that arc back into imperial line. A half-century of Third World Approaches to International Law (TWAIL) and Marxist analyses have established that the renovation of public international law as a tool of colonial emancipation in the post-war period belied a darker truth: international law was at the same time the primary means through which political, economic, racial and cultural inequalities, cultivated over centuries of colonial and imperial exploitation, were restructured and further entrenched.[2] The two-faced reality of Western liberal internationalism was no mystery to anti-colonial leaders and activists of the time. Frantz Fanon, who is invoked to open a good number of chapters in this collection, warned in 1958 that the 'granting' of independence would prove to be yet another phase of Western colonial exploitation: 'armed with a revolutionary and spectacular goodwill, [the metropole] grants the former colony everything. But in so doing, it wrings from it an economic dependence which becomes an aid and assistance programme'.[3] Seven years later, in 1965, Kwame Nkrumah diagnosed neo-colonialism as primarily exercised through 'economic or monetary means', and, invoking Lenin, famously indicted

[1] Koskenniemi, 'What's Law Got to Do with It? Recollections and Impressions', in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 443, at 450 [hereinafter *The Battle for International Law*].

[2] For a recently updated overview of TWAIL scholarship between 1996 and 2019, see the bibliography appended to Gathii, 'The Promise of International Law: A Third World View', Grotius Lecture American Society of International Law' (Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law, 25 June 2020), available at https://ssrn.com/abstract=3635509. For an overview of Marxist approaches, see S. Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (2008); Knox, 'Marxist Approaches to International Law', in A. Orford and F. Hoffmann, with M. Clark (eds), *The Oxford Handbook of the Theory of International Law* (2016) 306.

[3] Fanon, 'First Truths on the Colonial Problem', *El Moudjahid* (22 July 1958), quoted in Craven, 'Colonial Fragments: Decolonization, Concessions, and Acquired Rights', in *The Battle for International Law*, at 101, 102.

the era of formal decolonization as 'imperialism in its final and perhaps its most dangerous phase'.[4]

The cast of protagonists that emerge from these chapters as the titans in the 'battle for international law' are overwhelmingly Western-trained lawyers and statesmen. The list should now be familiar to students of 20th-century international law, and includes R. P. Anand, Georges Abi-Saab, Muthucumaraswamy Sornarajah, Mohammed Bedjaoui, Taslim O. Elias, Upendra Baxi and J. Sayatauw. The installation of this 'TWAIL I' generation in the pantheon of international law's great men has been one of the many vital contributions of TWAIL scholarship.[5] In this respect too, *The Battle for International Law* is less a contribution of new research than a restatement and elaboration of established themes.

Noting that this volume largely follows the lead of TWAIL and Marxist scholarship is not altogether a criticism. Solidarist restatement is entirely appropriate to the current moment, as the field enters yet another era of self-examination, prompted by compounding economic and environmental crises, increasingly strident anti-internationalisms and revisionist defences of colonialism and imperialism. In a time of real geopolitical precarity, there is no need to start from scratch in mounting the case for how international law has contributed to the economic inequality, instability and environmental degradation it claims on its surface to address. The scholarship is there, thanks in large part to the work of Marxist and TWAIL scholars, and to the social theorists and historians with whom these traditions make the effort to engage. But that scholarship has not always been taken up by high profile publicists, and rarely taught as canon.[6] Even if *The Battle for International Law* is largely retracing the steps of Marxist and TWAIL analyses of the decolonization era, it does so for a new audience, and does it exceptionally well. This forceful collection of 19 chapters, bookended by the editors' introduction and Koskenniemi's epilogue, offers an accessible entry point into those vibrant traditions of scholarship that might otherwise fall beyond the reach of more staid reading lists.

2 Setting the Scene: The Decolonization Era as *Sattelzeit*

In their Introduction, von Bernstorff and Dann place international law at the centre of the formal decolonization movements. They argue that the 'era presents, in essence, a battle that was fought out by diplomats, lawyers, and scholars, particularly over

4 K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (1965), at ix.

5 B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', 8 *Melbourne Journal of International Law* (2007) 499; Anghie, 'TWAIL: Past and Future', 10 *International Community Law Review* (2008) 479.

6 Former International Court of Justice (ICJ) judge Stephen Schwebel's recent review of the instant volume is an exception that proves this rule. See Schwebel, 'Review: Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law*', 21 *Journal of World Investment and Trade* (2020) 631. On teaching TWAIL, see Eslava, 'The Question of Agency and Structure: Critical Realism and the Teaching of (Another) International Law', 54 *The Law Teacher* (2019) 368.

the premises and principles of international law' (at 1). The editors deploy Koselleck's concept of the *Sattelzeit*, or 'bridging period', to characterize the period of formal decolonization as the 'transition from one form of Western hegemony to another' (at 5). Von Bernstorff and Dann mark out the two decades between the Bandung Conference in 1955 and the Declaration of a New International Economic Order (NIEO) in 1974, characterizing the period as a concerted 'trans-civilizational' movement of anti-colonial leaders that posed a fundamental challenge to the economic and institutional structures of Western dominance.[7] Borrowing from Gevers's chapter, which itself builds on Gathii's identification of 'weak' and 'strong' traditions of African international law, von Bernstorff and Dann draw distinction between the 'radicals' and the 'contributionists' of the first TWAIL generation.[8] That movement was, of course, comprised of many, from the Pan-African Movement, to the Non-Aligned Movement, to the G77, and organized around declaratory projects of self-determination, the common heritage of humankind, permanent sovereignty over natural resources and racial equality. The editors' organizing motivation is to affirm – against any dismissal of the period as a 'short-lived Southern or socialist (Cold War) revolt within UNGA with ultimately minor and negligible implications for international law and legal scholarship' – that the era marked a fundamental shift in international legal structures and relations (at 3).

The fateful irony, they argue, was that this shift was ultimately not away from Western dominance and exploitation of non-Western peoples and territories, but toward yet another form of Western dominance and exploitation: from 'the end of "classic" European imperialism' to 'the long rise of US dominance in international relations and a specific model of global capitalism, which was often called "neo-imperialism" or "neo-colonialism"' (at 5). Von Bernstorff and Dann's aim is to 'offer a better understanding of the contestations to the then-dominant perceptions of order', in order to 'give the reader a better grasp of how the world became what it is today by new historical insights into the conditions, contingencies, and necessities of what led to its current depressing and desolate state' (at 3). On the editors' reading, then, the battle for international law is over: 'While third world scholars and politicians succeeded in discrediting and delegitimizing the most apparent structures enabling classic colonial rule, the third world on balance clearly "lost" the battle for a new substantively reformed international law' (at 31).

The collection is curated in halves, the first around the concepts and institutions that served as key 'sites of battle', the second around the 'individual protagonists and regional perspectives' that emerged on that terrain. Von Bernstorff and Dann note that the decolonization battle was waged along two main fronts: the battle

[7] On the Bandung Conference, see L. Eslava, M. Fakhri and V. Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017). On the NIEO, see the special issue introduced by Gilman, 'The New International Economic Order: A Reintroduction', 6 *Humanity Journal* (2015) 1.

[8] Gevers, '"Literal Decolonization": Re-Reading African International Legal Scholarship through the African Novel', in *The Battle for International Law*, at 383; Gathii, 'International Law and Eurocentricity', 9 *European Journal of International Law* (*EJIL*) (1998) 184.

for independent status in international law through the strengthening of norms of sovereign equality and political self-determination; and the battle for substantive economic, cultural and institutional independence from colonial domination. The editors survey the armoury of 'hegemonic discursive moves' that agents of Western dominance – again, lawyers, scholars and statesmen – deployed to reconstruct the international order so as to concede formal political independence to former subjugated territories whilst reinforcing Western economic dominance. These 'moves', the editors note, included '"boundary drawing" between the political and the legal, international and national, private and public, and legal and economic aspects in order to exclude revolutionary arguments from the legal battle sites'; and 'integrat[ing] substantive claims made by the third world in legal and policy projects under Western institutional control in order to eat up their revolutionary potential'.[9] Von Bernstorff and Dann emphasize the ways in which coalescing third world demands for redistribution of political and economic power in the 1960s and 1970s were redirected via the 'functional specialization and disaggregation of the third world agenda' into a raft of new international institutions. Colonial officers were replaced with development experts.[10] Through the dull alchemy of technical expertise, the radical 'worldmaking' potential of decolonization was converted into an endless series of increasingly bureaucratized development, rule of law, structural adjustment and liberalization projects (at 30).[11]

All the while, the riptide of race pulled just under the utopian surface of the discourses and practices of international law. The editors invoke Oji Umozurike to make the point: 'International law was imbedded with white racism and thus promoted the interests of the whites while rigorously subordinating those of others. White racial discrimination was thus a fundamental element of international law during the period in question' (at 9).[12] Umozurike would probably forgive a contemporary reader for leaving off 'during the period in question'. But the editors do not go so far, even as their own conclusion begs the question of the role of race in contemporary international law: '[T]his *Sattelzeit* era brought about the international law of today — not as a simple continuation of colonialism, but as a transformed legal and political order that allows for new forms of hegemonic rule' (at 11). But the racial implications of this conclusion are largely left alone by the editors – as are the implications for contemporary practice of working within a field that remains, in substance if not in form, largely continuous with the era of racialised colonial domination that preceded it.

[9] *Ibid.*, at 6. See also S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

[10] Sinclair, 'A Battlefield Transformed: The United Nations and the Struggle over Postcolonial Statehood', in *The Battle for International Law*, at 257, 275.

[11] See also Dann, 'The World Bank in the Battles of the 'Decolonization Era'', in *The Battle for International Law*, at 278.

[12] Quoting O. Umozurike, *International Law and Colonialism in Africa* (1979), at 36.

3 Calling the Action: Notable Contributions in a Strong Field

Von Bernstorff and Dann describe the collection's method as 'intellectual history' (at 3). The term is used somewhat loosely to license an eclectic set of reflections, in which contributors are left to write to their own strengths. The chapters in the first half of the collection, themed 'Sites of Battle', range widely in scope, and are not always on all fours with the editors' sub-division between concepts and institutions. Most, in fact, talk directly to the nature of the relation between the two. Pahuja and Saunders's chapter, for example, explores how radical challenges to international law's concept of development – which, as Salvador Allende charged in 1972, elevated the rights of transnational corporations over those of newly independent states – were channelled via the United Nations Conference on Trade and Development (UNCTAD) into an ineffectual Commission on Transnational Corporations which recommended the adoption of corporate codes of conduct.[13]

The second half of the collection, 'Individual Protagonists and Regional Perspectives', coheres somewhat less than the first. Four great men are singled out for treatment: R. P. Anand, in Prabhakar Singh's chapter that considers how Anand's work built on Alexandrowicz to 'recover the lost histories of "new" postcolonial states without rejecting international law', whilst seeking to plot a path for India between resistance and co-optation;[14] Taslim Olawale Elias, in Carl Landauer's chapter that seeks to contextualize, and partially defend, Elias's 'modernizing' project against the charge of purveying a 'weak' or 'contributionist' African international law;[15] Mohammed Bedjaoui, in Umut Özsu's chapter that builds on Özsu's previous work on the NIEO to trace Bedjaoui's development from Algerian 'legal militant' to ICJ judge who insisted on the economic dimension of self-determination as a *jus cogens* norm;[16] and Charles Chaumont, in Emmannuelle Tourme Jouannet's chapter, that recovers the contributions of Chaumont and the École de Reims to a 'new' international law that aligned with aspects of Marxist, or specifically Maoist, dialectical materialism in indicting the colonial foundations of 'classical' international law.[17]

Whatever the challenges in arranging them, there are very few weak submissions here, as most chapters survey or rework the outstanding list of contributors' established depth of research. The contributions of Ranganathan, Sornarajah and Craven are illustrative in this regard. Surabhi Ranganathan's opening chapter on the common

[13] Pahuja and Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in *The Battle for International Law*, at 141.

[14] Singh, 'Reading R. P. Anand in the Post-Colony: Between Resistance and Appropriation', in *The Battle for International Law*, at 297.

[15] Landauer, 'Taslim Olawale Elias: From British Colonial Law to Modern International Law', in *The Battle for International Law*, at 318. For a contrasting treatment of Elias, see Gevers, *supra* note 8.

[16] Özsu, 'Determining New Selves: Mohammed Bedjaoui on Algeria, Western Sahara, and Post-Classical International Law', in *The Battle for International Law*, at 341.

[17] Tourme-Jouannet, 'Charles Chaumont's Third-World International Legal Theory', in *The Battle for International Law*, at 358.

heritage of mankind builds on her trailblazing work to frame the international seabed and its mineral resources as a key site of battle between developed and developing states.[18] Arvid Pardo's 1967 formulation of the common heritage of mankind (CHM) concept was intended as a means of preventing dominant powers from hoarding the speculative riches of the international seabed for themselves, via a prohibition on sovereign appropriation and encouragement of resource exploitation for common benefit. Versions of CHM had circulated long before Pardo's tactical reformulation, which was as much nationalist as it was solidarist. The adoption of the CHM concept in the Declaration of Principles Governing the Seabed was to prove less a resolution of the tension between putative sovereign equality and the vast disparities in states' economic and technoscientific capacity, than a container within which that tension would play out over subsequent decades.[19] As the pace of resource 'discovery' accelerated, there was little dispute over the desirability of regulation itself. International regulation of seabed mining in international waters was in no way antithetical to the interests of investors from wealthy states, who required legal certainty to structure their ventures. Redistributive profit sharing, however, certainly was. The interpretation of the concept of common benefit, and its translation into institutional design, became an ideological battlefield that has smouldered ever since, in relation not only to the seabed but also to space and the Antarctic.[20]

Ranganathan argues that the establishment of the Seabed Committee in 1967 to consider competing interpretations of the CHM principle 'only succeeded in increasing the opposition between developed and developing states' regarding a framework to govern seabed mining (at 40). The poles of the debate that played out over the late 1960s and early 1970s could not have become more starkly opposed. Developed states argued for a notion of CHM as *res communis*: an open zone of commercial freedom, with an international body functioning only as a registry and possible licensing agency, distributing fee revenue among member states. Developing states argued for all seabed mining to be conducted by that international body itself, which would then distribute mining profits among member states. Ranganathan observes that, amid the baroque variations that emerged on translating CHM into practice, the debate became about much more than regulating access to seabed resources, the value of which remained speculative, and increasingly doubtful as the 1970s wore on. Along with permanent sovereignty over natural resources, the seabed debate became a central theme in articulations of the NIEO. As Chimni put it, the debate came to be seen as

[18] Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', 30 *EJIL* (2019) 573; Ranganathan, 'Global Commons', 27 *EJIL* (2016) 693.

[19] UN General Assembly, 25th Session, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of Nations Jurisdiction, UN Doc. A/RES/2749 (XXV), 17 December 1970.

[20] Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation', 30 *EJIL* (2019) 601; Storr, "Space is the Only Way to Go': The Evolution of the Extractivist Imaginary of International Law', in S. Pahuja and S. Chalmers (eds), *Routledge Handbook on International Law and the Humanities* (forthcoming 2021).

'a microcosm of the possibilities the future held and the inauguration of a new era of international relations' (at 44).[21]

The compromise reached during the Third United Nations Conference on the Law of the Sea did not augur well for that future. Part XI of the 1982 Law of the Sea Convention was an ideological and institutional Frankenstein, stitched together from competing proposals.[22] Part XI envisaged a 'parallel system' in which both commercial entities and an international body, the Enterprise, would undertake mining activity in the Area. The International Seabed Authority (ISA) would oversee an exploration and exploitation licensing regime, including 'site banking' of comparable sites for exploitation by the Enterprise, which the ISA itself would run. Commercial operators would enter into 'partnership' agreements with developing states, supposedly in the interests of development and technology transfer. Only the profit of the Enterprise's activity would be subject to redistribution to member states. Ranganathan notes that, contrary to the now-common notion that this compromise was welcomed or celebrated by a unitary bloc of 'developing' states, the ungainly shape of Part XI was received as a disappointment of the redistributive possibilities of the CHM principle. Chimni reached more ominous conclusions, taking the seabed regime as evidence that the 'restructuring or altering of existing international property relations [was] not possible through legal instruments' (at 49).[23] The Enterprise, now a shell housed within the ISA executive, is one of international legal evolution's more peculiar mutations – an appendix with forgotten function, dormant but prone to rupture still. If the battle over the seabed did indeed concern the 'whole range of future international institutions governing international commons' (at 47),[24] it is unsurprising that later attempts to revive the CHM principle in treaty regimes governing mineral resource extraction in the Antarctic and in space have proven largely dead in the water.

Sornarajah's chapter, 'The Battle Continues: Rebuilding Empire through Internationalization of State Contracts', is one of a number that address the trajectory from the late 19th-century era of colonial concessions to the regime of international investment law that developed in the later 20th century. Sornarajah states a case that is now familiar, due in no small part to a lifetime of his own advocacy in the field: 'investment and trade were the purposes of empire' (at 175), and still are.[25] Colonial legal systems developed to protect and entrench imperial investment and trade, both within local and export markets. Metropolitan economies came to depend on the myriad benefits that flowed their way. The 'natural course' of self-determination, as Sornarajah puts it, would have resulted in the legal restructuring of decolonizing states to deliver political and economic control over domestic resources,

[21] Quoting Chimni, 'International Law Scholarship in Postcolonial India: Coping with Dualism', 23 *Leiden Journal of International Law* (*Leiden JIL*) (2010) 23, at 38.

[22] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994).

[23] Quoting Chimni, 'Law of the Sea: Winners are Losers', 17 *Economic & Political Weekly* 24, (1982) 987.

[24] Koskenniemi and Lehto, 'The Privilege of Universality: International Law, Economic Ideology and Seabed Resources', 533 *Nordic Journal of International Law* (1996) 533, at 541.

[25] See also M. Sornarajah, *The Pursuit of Nationalized Property* (1986).

damming that imperial flow. Against that unthinkable possibility, 'former imperial powers, along with the MNCs… worked out a system that enabled the continuation of imperial control over much-needed natural resources as well as control over markets of their erstwhile colonies' (at 181).

Sornarajah argues that the contemporary structure of bilateral investment treaties formalized a strategy of investment protection that was devised between 1947 and 1974, effectively placing state contracts beyond the reach of domestic jurisdiction by 'upgrading foreign investment to public international law'. The task for British imperial strategists – of which international lawyers formed a key battalion – was to ensure that investment contracts could be enforced by corporations in decolonizing states, whilst limiting the exposure of both corporations and their home states to liability for harm caused to host state interests. The Mossadegh government's Iranian oil nationalization programme in 1951 was an early body blow struck against the British empire, and the 1952 ICJ decision made plain the insufficiency of relying on diplomatic protection to access international protections for concessionary rights.[26] Over a series of arbitral awards concerning oil concessions in the Middle East in the 1950s, European arbitrators contrived the logical structure of what would later become the contemporary system of investment arbitration. Foreign investment, the logic went, was of *a priori* benefit to the host state. No foreign company, however, would invest without legal certainty as to protection against local risk, a euphemism oblique enough to capture most functions of sovereign governance. The law of the host state would be nominally recognized as the law applicable to the determination of the contract, a necessary hat-tip to postcolonial sovereignty. But any one of a number of expansive justifications – from the inclusion of choice of law or arbitration clauses in a contract, to a perceived absence of 'sophisticated' relevant local jurisprudence – would be sufficient to 'internationalize' the contract, granting the investor access to an invented 'customary' international investment law pathologically sympathetic to corporate interests.

Sornarajah pulls no punches in his account of the re-writing of the logic of investment protection during the decolonization era. He indicts 'mainstream writers on international law' for 'acting as mercenary purveyors of the internationalization theory' that 'could not be reconciled with basic concepts of existing international law' (at 187). He names names: Hersch Lauterpacht, Arnold Duncan McNair, Robert Yewdall Jennings, Hans Kelsen and Hans Wehberg among them.[27] Sornarajah lays plain the moral hazard of treating as sources of law a 'string of arbitral awards' and the writings of 'highly qualified publicists' who stood to gain personally from the invention of custom, a complicity that 'call[ed] into question the sanctity that attaches to scholarship' (at 188). This is the political point the editors steer clear of making

[26] Pahuja and Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Case Revisited', in J. Crawford et al. (eds), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz* (2017) 53. See also Anglo-Iranian Oil Company case (*United Kingdom v Iran*), Judgment of 22 July 1952, ICJ Rep 1952, 93.

[27] R. Y. Jennings, *The Acquisition of Territory in International Law* (2nd ed. 2017).

themselves: the work of reconstituting empire was done by stellar international lawyers then, and it still is being done now.[28]

The General Assembly became a major forum for decolonizing states to voice their resistance to this re-writing of foreign investment rules to evacuate political independence of economic guts. Decolonizing states doggedly passed resolution after resolution affirming the right to economic self-determination, a diplomatic movement punctuated by the Declaration on Permanent Sovereignty over Natural Resources in 1962 and the Declaration of a New International Economic Order in 1974.[29] That effort, however, was met with a second strategy of imperial riposte, again devised by prominent European international lawyers, of undermining the law-making potential of General Assembly Resolutions. While the NIEO may have been pronounced dead in the late 1970s, Sornarajah concludes that the movement's legacy is evident in contemporary moves 'away from the notion that foreign property is sacrosanct and must be protected at all cost' (at 196).

Craven's chapter, 'Colonial Fragments: Decolonization, Concessions, and Acquired Rights', addresses a similar theme but draws the timeframe back further, pointing to the preparatory groundwork laid down by jurists in the late 19th and early 20th centuries. The chapter is a salutary reminder that the most enduring characteristic of empire is its capacity to reinvent itself as progressive reform. As such, summarizing the transition from colonial to neo-colonial era as 'political change, economic continuity' is misleading: 'the language of legal continuity (and economic stability) provided cover for a fundamental transformation of the legal landscape of the colony, turning regimes of resource extraction into foreign investments, public works into private undertakings, and political institutions into economic enterprises' (at 103). Craven focuses on concession agreements and acquired rights doctrine as central to this transformation, and inverts established truisms about both. Against the presumption that colonial concessions perversely augmented private power, he argues that 'the institution of the concession agreement… was not so much a blurring of the (putative) boundaries between public authority and private entitlement, but rather the opposite: an attempt to put those conditions in place' (at 108). As such, concessionary rights were 'intimately connected to the *production* of public power' of the colonial state (at 108), effectively constructing the public authority to grant them.

In the 20th century, jurists including D. P. O'Connell, Gidel, Deschamps and Garcia-Amador worked to protect concessionary rights against intervention by successor states by merging the public international law doctrine of state succession with the private international law doctrine of acquired rights. Both doctrines shared a

[28] In a contemporary variation on the theme, Toni Marzal argues that the widespread consensus in Investor State Dispute Settlement (ISDS) that calculation of compensation and damages is an 'essentially uncontroversial' fact-finding operation obscures a series of myths and assumptions that produce grotesquely unjustifiable results. See Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS' (2020) (Unpublished article, on file with author).

[29] Permanent Sovereignty over Natural Resources, GA Res 1083 (XVII), 14 December 1962. Declaration on the Establishment of a New International Economic Order, GA Res 3201(S-VI), 1 May 1974.

common logic in insisting, in von Savigny's rendering, that the 'natural limits' of political authority stopped at the altar of private rights (at 111). Yet Craven argues the maintenance of economic domination in the decolonization era was not inevitable. Rights created through colonial-era concessions required significant conceptual overhaul of their character to ensure protection against decolonizing states: rights were no longer held under domestic colonial law, but under 'foreign' law; concessionaires were no longer functionaries of the metropolitan state, but purely private individuals; and rights held were no longer of contractual but equitable character, protected under the invented customary law indicted by Sornarajah. Thus, Craven concludes, the deck was stacked well before the 1950s: 'subsequent "battles" over permanent sovereignty, the right to nationalize, or the requisite standard of treatment of foreign investments… were all battles that took place on ground that had already been largely conceded' (at 123).

4 Reviewing the Play: Decolonization in the 21st Century

The *Battle for International Law* is a commanding collection that synthesizes a wealth of scholarship on the period in question. For all its strengths, however, the collection leaves pressing questions unanswered. Many of these might have been addressed through a more concerted effort to recognize the debt owed to the more recent generation of TWAIL and Marxist literature in addressing contemporary challenges of decolonization in international law.[30] Firstly, the collection's 'battle' device, as useful as it is, illustrates the historiographical limitations of adopting binary frames in international legal history. Ranganathan is careful to note in her chapter on common heritage that 'developing states' were not uniform in their support for an international mechanism for redistribution, some preferring to prosecute their sovereign interests via expanded zones of national jurisdiction. The binary framing of the collection – South–North, colonial–decolonizing – works against this kind of corrective. As Anghie has put it, 'the Third World project has always been marked by the challenge of establishing solidarity in the midst of significant divergences and differences'.[31] The persistent alignment of Third World states with Soviet or Maoist agendas is itself a relic of Cold War propaganda that obscures more than it illuminates regarding how Third World solidarity was built and how it was thwarted.[32]

Secondly, as discussed above, von Bernstorff and Dann seem reluctant to follow through on the charge of racial domination laid down by Umozurike and countless others over the last century of international law's attempts at global order. The

[30] For a useful overview, see Taha, 'Decolonization in International Law', *Oxford Bibliographies Online* (last modified 28 August 2019), available at https://bit.ly/3ojGi1A.

[31] Anghie, 'Legal Aspects of the New International Economic Order', 6 *Humanity* (2015) 145, at 146.

[32] Bowring, 'The Soviets and the Right to Self-Determination of the Colonized: Contradictions of Soviet Diplomacy and Foreign Policy in the Era of Decolonization', in *The Battle for International Law*, at 404. See also Mamlyuk, 'Decolonization as a Cold War Imperative: Bandung and the Soviets', in Eslava et al., *supra* note 7, at 196.

editors mention the radical potential of anti-colonial indictments of the symbiotic relationship between constructs of race and colonial exploitation in the late 1950s and early 1960s (at 17–20). They further note that potential was defused in the period between the 1965 Convention on the Elimination of Racial Discrimination and the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, as questions of race were reframed within the logic of human rights and racial discrimination.[33] But not much more is said. The chapter by Giladi does much of the heavy lifting in bringing issues of race into sharper relief, which has long been a foundational commitment of TWAIL and much Marxist international law.[34] Giladi traces shifts in the formulation of race as an analytical category during the decolonization era, and argues that the tactical focus on apartheid in South Africa in the 1960s 'may have been the conduit for denouncing colonialism at large', but 'did not serve well the cause of de-racializing international law'.[35] He argues that the Apartheid Convention, which followed the ICJ's perverse 1966 majority judgment in the South West Africa Cases revisited in Ingo Venzke's chapter, signalled the 'end of a conversation on race' in international law, not a beginning.[36] Giladi concludes that 'as an aberration, apartheid vindicated colonialism' (at 224–226). His conclusion well describes the way in which extremes of white supremacy in the European settler colonies – South Africa, Australia and the United States being the most obvious here – still function to vindicate more sophisticated structures of racialization in the metropoles. If the colonial legacy of international law is to be confronted head on, as *The Battle for International Law* effectively does in so many ways, questions of race cannot be skirted around by relegating them to the past or to the settler colonial context.[37]

Thirdly, the editors' observation that it was 'in a way paradoxical that the third world saw itself compelled to fight the battle within the normative language of the colonizers' points towards the limitations of adopting a statist paradigm of decolonization (at 2). Insofar as the decolonization struggle in the era concerned *did* play out over the doctrines, practices and institutions of international law, the editors' statement is clearly true. But to define the 'decolonization era' *as* a battle for international law led by statesmen, lawyers and scholars on the terrain of international institutions between the 1950s and 1970s only partially captures the complexity of decolonial struggle.[38] To identify international law as the 'frontline' of the decolonization movements in

[33] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195. International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243.

[34] See Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism', 4 *London Review of International Law* (2016) 81.

[35] Giladi, 'Picking Battles: Race, Decolonization and Apartheid', in *The Battle for International Law*, at 216, 223.

[36] Venzke, 'The International Court of Justice During the Battle for International Law (1955–1975): Colonial Imprints and Possibilities for Change', in *The Battle for International Law*, at 235.

[37] Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider', 45 *Villanova Law Review* (2000) 841; Knox, 'Race, Racialisation and Rivalry in the International Legal Order', in A. Anievas, N. Manchanda and R. Shilliam (eds), *Race and Racism in International Relations: Confronting the Global Colour Line* (2014) 175.

[38] Nesiah, 'Placing International Law: White Spaces on a Map', 16 *Leiden JIL* (2003) 1.

effect produces the problem with which it concludes – that decolonial activists were forced to adopt a language and a grammar that ultimately defeated them.

But decolonial struggle played out, and continues to play out, in contexts far beyond the formal theatre of the international. The statist paradigm of decolonization that underpins the volume is understandable, but it constrains its purview in key respects. First, it omits much of the colour and light of the more radical global imaginaries of the period in question. The global roll call of anti-colonial writers, artists and agitators who wrote, spoke and performed sharp assessments of the reconstitution of colonial exploitation as a liberal internationalist project was of course far broader than those who engaged in the colonial, elitist and male-dominated language of international law. Thankfully, a long overdue re-crowding of the stage of decolonial history is taking place, thanks not only to TWAIL and Marxist international lawyers, but also to a broader transdisciplinary movement interrogating the phenomenon of 20th-century internationalism as the 21st takes on its own character.[39] In addition to the contributions of Western-trained international lawyers like Anand, Bedjaoui and Elias, the significance of more radical interventions is increasingly appreciated, as more recent engagements with the interventions of Fanon, Nkrumah, Aimé Cesaire, Nnamdi Azikiwe, Patrice Lumumba and Thomas Sankara have demonstrated.[40] But international law is yet too closely related to the first: the statist paradigm does not well reflect understandings of decolonization as an on-going project with epistemic as well as material dimensions, as Fanon himself made clear.[41] The absence of women, of indigenous peoples, of islanders and in large part of East and South East Asian and Central and South American peoples in *The Battle for International Law* does not simply point towards a general need for ever-more thorough 'contributionist' correctives to the history of international law. It also points towards an on-going need to engage seriously with decolonization as a radically unsettling challenge to international law – one that requires interrogation of international law's modes of knowledge production and cultures of exclusivity as much as its role in inaugurating and legitimizing structures of neo-colonial dominance.[42] Acknowledgement of the epistemic dimensions of decolonization is necessary, and yet cannot alone substitute for reckoning with the fundamental demand for redistribution of political power and material resources that grounds the concept.[43] Ndlovu-Gatsheni has cautioned against weak co-optations of the term: 'decolonization has to remain a revolutionary term with theoretical and

[39] See, e.g., A. Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (2019); P. Gopal, *Insurgent Empire: Anti-Colonial Resistance and British Dissent* (2020).

[40] See Gevers, *supra* note 8; Kendall, 'Postcolonial Hauntings and Cold War Continuities: Congolese Sovereignty and the Murder of Patrice Lumumba', in M. Craven, S. Pahuja and G. Simpson (eds), *International Law and the Cold War* (2019) 533.

[41] F. Fanon, *The Wretched of the Earth* (R. Philcox trans., Grove Press, 1963); N. wa Thiong'o, *Decolonizing the Mind: The Politics of Language in African Literature* (1986); L. Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).

[42] Tuhiwai Smith, *supra* note 41.

[43] Tuck and Yang, 'Decolonization is not a Metaphor', 1 *Decolonization: Indigeneity, Education and Society* (2012) 1.

practical value'.[44] The TWAIL movement itself, taking heed of developments in critical race theory, in feminist theory, in Indigenous studies and in post-colonial, settler colonial and decolonization studies, has begun the project of considering how international law might understand its relationship to decolonization, understood not as a battle lost in the 20th century, but as an unresolved challenge for the 21st.[45]

5 Conclusion: Breaking Down the Fourth Wall

The Battle for International Law is a valuable collection that metabolizes a wealth of critical scholarship and presents it anew, with the aim of reaching a readership that might not otherwise engage with the literatures on which it builds. If the collection leaves the reader with one impression, it is that there is no room left for disciplinary moves to innocence as to the destructive capacities of international law, or to the magnitude of the on-going challenge in answering them. Series editor Nehal Bhuta writes in the Preface that '[i]f we are to have a chance of grasping what is at stake in the present contestation, we need to better understand the battles that went before'. This is unquestionably true. But Bhuta's comment that this volume is a 'starting point for a whole new *oeuvre* of history that begins to pull more determinedly at the specific threads of the stories that are gathered together here' works to obscure the generations of TWAIL and Marxist literature that have laid the groundwork for this volume, and that continue to illuminate the radical challenges that decolonization – understood as a revolutionary project with theoretical and practical dimensions – continues to pose to today's generation of international lawyers.

As Koskenniemmi himself concludes, 'the battle may be over, but the war rages on' (at 454). If *The Battle for International Law* serves as a timely restatement and consolidation of major themes of TWAIL and Marxist international law, it brings us to the question of where the frontline now lies. What might the decolonization of international law mean in the wake of 2020? What might disciplinary leadership look like in this *Sattelzeit* of ours – and what of disciplinary complicity in the never-ending reconstitution of empire? The stakes of this question have never been confined to the past, or to the 'South', the geography of which has long been shifting. Nkrumah's warning still stands:

> Neo-colonialism, like colonialism, is an attempt to export the social conflicts of the capitalist countries.... But the internal contradictions and conflicts of neo-colonialism make it certain that it cannot endure as a permanent world policy. How it should be brought to an end is a problem that should be studied, above all, by the developed nations of the world, because it is they who will feel the full impact of the ultimate failure.[46]

[44] Omanga, 'Decolonization, Decoloniality, and the Future of African Studies: A Conversation with Dr. Sabelo Ndlovu-Gatsheni', *items: Insights from the Social Sciences* (14 January 2020), available at https://bit.ly/3qtfMoL.

[45] See, e.g., Gathii, 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other', 67 *UCLA Law Review* (forthcoming 2020); Reynolds, 'Disrupting Civility: Amateur Intellectuals, International Lawyers, and TWAIL as Praxis' 37 *Third World Quarterly* (2016) 2098; Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World', 14 *Oregon Review of International Law* (2012) 131.

[46] Nkrumah, *supra* note 4, at xii.